

presumably have brought forward in their defence to the application had they been present. As was said by Isaacs J. in *Thomas A. Edison Ltd. v. Bullock*⁽¹⁾ at page 682:

"*Uberrima fides* is required, and the party inducing the court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail."

Accordingly, the plaintiff, who was represented, could reasonably have anticipated that had her application been made *inter partes* the defendants would have raised an objection founded on delay since the essence of an application for an interlocutory injunction is that "it should be made with promptness" — *Sherwell v. Combined Incandescent Mentles Syndicate Ltd.*⁽²⁾ It follows that an explanation for the long delay should have been, but was not, offered right from the start, that is to say, at the *ex parte* stage. The omission was, to my mind, most material.

I say so because the question whether the fact omitted is material does not depend on establishing that the undisclosed matters in question would, if disclosed, have been decisive against the party who has not made proper disclosure. It is enough to show that it is relevant and might foreseeably have been regarded by the Court as of weight; so for example, there is authority for saying that the test is to ask whether there has been any "misstatement or omission of any important facts": *A.G. v. Liverpool Corporation*,⁽³⁾ *Rex v. Kensington Income Tax Commissioners*.⁽⁴⁾

The fact that at the *inter partes* stage the plaintiff was overflowing with candour and offered a lengthy explanation in her affidavit in opposition to the application now before me does not in the circumstances assist her. It is therefore unnecessary for me to consider those explanations, the gist of which was that she was the victim of a concealed fraud practised upon her by the first and second defendants so that she first became aware that her rights were being infringed only as recently as September, 1983.

I might add that in arriving at the above conclusion I have not overlooked the extent of the duty of an applicant applying *ex parte* as explained by Warner J. in *Re A Debtor* (No. 75N of 1982,

A *Warrington*), *ex parte the debtor v. National Westminster Bank plc. and another appeal*.⁽⁵⁾ In that case His Lordship described it thus:

B "The rule in *Ex p Princess de Polignac* exists because, by definition, on an *ex parte* application the person against whom the order is sought is absent. It is accordingly the duty of the applicant to inform the court of any facts which he knows which might tell in that person's favour. But the applicant is under no obligation to place before the court every fact that might reinforce his own case."

C Accordingly, I am satisfied that there was here a non-disclosure of material facts in that the plaintiff had omitted to explain, at the *ex parte* stage, the lapse of nearly twenty years on her part in the institution of the suit.

D The *Ex Parte* Order will therefore have to be set aside irrespective of the merits: *Castelli v. Cook*⁽⁶⁾ and *Dalglish v. Jarvi*.⁽⁷⁾

E The plaintiff, however, does not become anathema for all purposes. She may, if she wishes, make application *de novo* for an interlocutory injunction (see *Thomas A. Edison Ltd. v. Bullock*, *supra*); but, on any further application, proceedings should take place on notice, rather than *ex parte*, and, if so, full and fair disclosure must be made. The application will then be considered on its merits.

F In the result, I allow the application for discharge of the *Ex Parte* Order with costs.

Order accordingly.

G Solicitors: *Shamsuriah & Balasundaram; Lim, Lim & Oon.*

OVERSEA-CHINESE BANKING CORPORATION LTD. v. NATIONAL UNION OF BANK EMPLOYEES & ANOR.

H

[O.C.J. (Harun J.) January 3 & April 18, 1985]

[Kuala Lumpur — Originating Motion No. A53 of 1984]

I *Administrative Law — Certiorari — Application to quash award of Industrial Court ordering reinstatement of bank employee — Court in error and order of reinstatement superfluous.*

Industrial Law — Employment — Application to quash award of Industrial Court ordering reinstatement of bank employee — Whether "transfer" subject matter of "trade dispute" — "connected with" — Meaning of — Industrial Relations Act 1967, ss. 2, 16(1), 26(2) & 32.

This was an application for an Order of *Certiorari* to quash an award of the Industrial Court ordering the applicant to reinstate its employee, Wong Lee Sim (Wong) to his former post of Book-keeper or to any recognised post established for a Special Grade Clerk.

Wong joined the Bank in September 1960 as a Timescale Clerk. He was promoted to Special Grade Clerk in 1969. In May 1981, he was appointed the Book-keeper of the Accounts Department in the Bank's main branch. In December 1983, the Internal Auditors found certain discrepancies between his books and the subsidiary ledger maintained by another clerk with regard to the entries made in January 1983. On December 15, 1983, the Bank wrote to Wong for an explanation regarding the discrepancies. He explained by letter of December 19. On December 22, Wong was asked by the Bank to attend a preliminary inquiry. On the same day the Bank transferred Wong from the Accounts Department to the Credit Administration Department in the same office building without any loss in pay or grade. The Bank contended that the transfer was an interim measure to facilitate investigation of the falsification.

The Union complained to the Minister of Labour who referred the dispute to the Industrial Court on March 17, 1984. The Bank then applied to the High Court for an order for *Certiorari* to quash the Minister's reference and an Order of Prohibition to prohibit the Industrial Court from hearing the reference on the ground that the issue of transfer in this case was not a trade dispute within the definition of the Industrial Relations Act 1967. On May 11, 1984 the High Court dismissed the application on the ground that an Order for *Certiorari* was unnecessary and an Order of Prohibition was premature. The Industrial Court proceeded with the hearing resulting in the impugned Award.

Held, allowing the bank's application: (1) the court fell into the error of asking itself the wrong question by an over-emphasis on the aftermath of the transfer. It was said that Wong had been transferred to an inferior post. In doing so the Court overlooked the fact that the posting to the Credit Administration Department was itself an interim measure and had to be carried out at short notice pending the outcome of the inquiry;

(2) the order of reinstatement itself is superfluous because Wong had never lost his job as a Special Grade Clerk in the Bank;

(3) the order of reinstatement as Book-keeper was contrary to Article 16(1) of Award 117/82 as it deprived the Bank's right to transfer its employees at its sole discretion.

Case referred to:

- (1) *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees' Union & Ors.* [1980] 2 M.L.J. 165.

ORIGINATING MOTION.

C.V. Das (M. Nagarajah with him) for the applicant.

K.P. Gengadharan for the 1st respondent.

A 2nd respondent — No appearance.

Cur. Adv. Vult.

Harun J. : This is an application for an Order of *Certiorari* to quash Award No. 252 of 1984 made by the Industrial Court on October 31, 1984 ordering the Applicant (Bank) to reinstate its employee, Wong Lee Sim (Wong) to his former post of Book-keeper or to any recognised post established for a Special Grade Clerk.

Wong joined the Bank in September 1960 as a Timescale Clerk. He was promoted to Special Grade Clerk in 1969. In May 1981, he was appointed the Book-keeper of the Accounts Department in the Bank's main branch. In December 1983, the Internal Auditors of the Bank carried out their yearly check of the books maintained by Wong and found certain discrepancies between his books and the subsidiary ledger maintained by another clerk with regard to the entries made in January 1983. By letter of December 15, 1983, the Bank asked Wong to explain the discrepancies. He did so by letter of December 19. Pursuant to the matters raised by Wong in his explanation, the Bank sent him a letter on December 22 to attend a preliminary inquiry. On the same day the Bank transferred Wong from the Accounts Department to the Credit Administration Department in the same office building without any loss in pay or grade.

By letter of December 27, the Respondent Union protested to the Bank that the transfer was unfair because —

- (a) Wong was transferred to a post which is not a Special Grade Clerical post; and
- (b) Wong is being victimised as a result of the falsifications made by another clerk who had admitted to making the false entries and had since resigned from the Bank.

The Bank's answer is that the transfer was an interim measure to facilitate investigation of the falsifications and in any event it had the right to transfer its staff between departments in the same office at any time at its sole discretion. The Union then complained to the Minister of Labour who referred the dispute to the Industrial Court on March 17, 1984. The Bank then applied to the High Court for an Order of *Certiorari* to quash the Minister's reference and an Order of Prohibition to prohibit the Industrial Court from hearing the reference on the ground that the issue of transfer

in this case is not a trade dispute within the definition of the Industrial Relations Act, 1967 (the Act).

On May 11, 1984, the High Court dismissed the application on the ground that an Order of *Certiorari* is unnecessary and an Order of Prohibition is premature. The Industrial Court proceeded with the hearing resulting in the impugned Award.

Jurisdiction

In this application the Bank, as it did before the Industrial Court, contends that the Court had no jurisdiction to hear the dispute because a 'transfer' in accordance with the terms of employment cannot be the subject-matter of a 'trade dispute' as defined in section 2 of the Act, which reads:

"Trade dispute means

any dispute between an employer and his workmen which is connected with

the employment
or
non-employment
or
the terms of employment
or
the conditions of work

of any such workmen."

By section 32 of the Act, the terms of employment of Wong are governed by Industrial Court Award No: 117 of 1982. Article 16(1) of that Award provides –

"Transfers of employees between departments within a branch and transfers between branches of the Bank within the same city or town may be made by the Bank at any time at its sole discretion."

It is argued that the words "connected with" in the definition of "trade dispute" carry a limited meaning. To be a trade dispute, the dispute must relate to the term itself *e.g.* as to what the terms of transfer ought to be or whether employees are liable to transfer. It should not, as in the instant case, be a dispute as to the propriety of the transfer. It is further argued that there are adequate provisions in the Act regarding the *implementation* of any term in the Award, *e.g.*

- (a) If it is alleged that the employee is being transferred because of his trade union activities, the remedy is section 8 of the Act;

- A (b) The Union could apply to the Court for interpretation of Article 16(1) under section 33 of the Act;
(c) The Union could lodge a complaint of non-compliance with Article 16(1) under section 56 of the Act.

In my view "connected with" is an expression wide enough to include not only a dispute on the terms of employment itself but also if the dispute is concerned with interpretation of the existing terms or with their enforcement. What this means in practice is that any party to a collective agreement or bound by an award of the Industrial Court is at liberty to have a dispute between the employer and workmen arising out of any term of the collective agreement or award, referred to the Industrial Court under section 26 or 33 or 56 of the Act. It all depends on the nature of the dispute but if there is any doubt then the proper course is a reference under section 26 of the Act. In the instant case, the Industrial Court heard the reference under section 26(2) of the Act and it therefore had jurisdiction to hear the dispute.

Merits

E On the merits, the Industrial Court found

"In considering the conditions of a man's employment, though the wages which he gets are very important, yet it is not wages alone that count; status and dignity have a great deal to do with other conditions of a man's service. Thus, the Claimant's (Wong) transfer is, in our view, not a fair one as it was done to humiliate him and to lower his status and dignity.

For the reasons given above, we hold that the Claimant's transfer is not *bona fide*. It is made by way of punishment in that his status and dignity have been appreciably lowered. And it will not be right for the Bank to transfer him to an inferior post even on the same wages. We, therefore, order that the Claimant be reinstated to his former post as a Book-keeper or to any recognised post established for a Special Grade Clerk within two weeks from date of this Award."

Section 33B(1) of the Act provides, *inter alia*, that an award of the Industrial Court "shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court." The Privy Council in *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees' Union & Ors.*⁽¹⁾ however held that such a provision in the law will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by certiorari proceedings if the Industrial Court has acted without jurisdiction or in the excess of the limits of its jurisdiction, or if it has done or failed to do something in the course of the

inquiry which is of such a nature that its decision is a nullity. In the instant case, Wong was transferred out of the Accounts Department on the same day he was asked to attend a preliminary inquiry with regard to the discrepancies in the accounts. On that day (December 22, 1983) it had not yet been determined who was at fault because the inquiry had not even commenced. It cannot therefore be said that he was being punished or humiliated. The Bank had contended all along that the transfer was an interim measure to facilitate investigation of the falsifications. The Court has not given any reason why it did not accept the explanation given by the Bank. The issues of victimisation, status, dignity and even unfairness did not arise out of the act of the transfer from the Accounts Department on December 22. The Court asked itself the wrong questions because it did not address itself to the sole question before it, *viz.* whether the Bank had the right to transfer Wong from the Accounts Department on December 22. The Bank clearly had the right under Article 16(1) of Award 117/82. It need not even give an explanation.

In my view the Court fell into the error of asking itself the wrong question by an over emphasis on the aftermath of the transfer. It is said that Wong had been transferred to an inferior post. In doing so the Court overlooked the fact that the posting to the Credit Administration Department was itself an interim measure and had to be carried out at short notice pending the outcome of the inquiry. Indeed the Court in paragraph 3 of the Award found that the Minister had referred the dispute to the Court even before the Bank had made a decision on the result of the inquiry. Be that as it may, Wong was not asked to do a menial job. In fact, at the Credit Administration Department his job was to oversee the overdraft accounts of the Bank's 25 branches. Further, Award 117/82 does not grade any particular clerical job, but grades the clerks.

Finally, the order of reinstatement itself is superfluous because Wong has never lost his job as a Special Grade Clerk in the Bank; and the order of reinstatement as Book-Keeper is contrary to Article 16(1) of Award 117/82 as it deprives the Bank's right to transfer its employees at its sole discretion. In my judgment, for the reasons stated and in all the circumstances of this case, the decision of the Industrial Court is a nullity and I accordingly grant *certiorari* to quash the Award of

A the Industrial Court with costs.

Application allowed.

Solicitors: *Shook Lin & Bok; Aziz Abdullah & Co.*

B

**MUNIANDY & ANOR. v.
MOHAMED BIN ABDUL GHANI**

[O.C.J. (Eusoff Chin J.) April 23, 1985]

C

[Kuala Lumpur – Civil Suit No. P640 of 1980]

Tort – Negligence – Personal injuries – Whether defendant driver liable.

Damages – Multiple injuries – Assessment of quantum based on 100% liability.

D

Road Traffic – Robot lights and traffic warden's directions – Which prevail – Traffic Signs (size, colour and type) Rules, 1959, rr. 16 & 17 – Highway Code, para. 17.

E

The plaintiff, a carpenter and rider of a motor-cycle sued the defendant, driver of a motor-car, for damages arising out of a road accident on the morning of February 20, 1972, when the plaintiff was proceeding from the direction of Kebun Bunga to go to Segambut. At the junction with Jalan Semantan, his motor-cycle collided into the motor-car driven by the defendant. The junction of Jalan Duta and Jalan Semantan was controlled by robot lights. The plaintiff claimed that as he was approaching the

F

junction the robot lights were green. He was following another motor-cycle which was 30 ft. ahead. When he was crossing the junction the defendant's car came from the opposite side and turned to its right and the plaintiff crashed into the left front side of the defendant's car. The plaintiff was admitted for 14 days in the hospital and he sustained the following injuries: (1) Laceration of angle of mouth and right cheek, haematoma of right eye, (2) Fracture lower 1/3 of the right radius with dislocation of the ulna, (3) loss of 5 front teeth, and had one tooth fractured, (4) fractured bones at 3 places – mandible, left zygoma (cheek) and middle third of face.

G

The fracture of the right radius had united with slight overlap at the fracture site. There is 1/6" shortening of the right arm which is permanent. There is likely to be permanent limitation of the rotation of the right forearm by 20° as there had been a dislocation as well as a fracture. The wasting of the right forearm could be improved by physiotherapy. The plaintiff was earning \$600 p.m. before the accident. He claimed he could not work for two years after the accident.

H

I

The defendant denied liability. He said he was stopped by a traffic warden, who directed the traffic from the defendant's side to proceed into Jalan Semantan. The defendant felt safe to move ahead, when the plaintiff's motor-cycle collided into his car.

Held: (1) the defendant was not liable for the accident;